

**Malayan Banking Bhd v
Fleur Chem Sdn Bhd & Ors and another suit**

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HIGH COURT (KUALA LUMPUR) — SUIT NOS D2-22-419 OF 1997
AND D2-22-420 OF 1997
NALLINI PATHMANATHAN JC
10 JULY 2009

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Banking — Banks and banking business — Banking facilities — Overdraft and trust receipt facilities — Bank allegedly refused defendants' documentary credit applications — Whether plaintiff was in breach of terms of banking facilities when it rejected documentary credit applications — Whether plaintiff recalling facilities granted to defendants was premature — Whether plaintiff was liable to defendants by way of counterclaim for losses suffered by them as a consequence of rejection of credit applications

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Evidence — Proof, standard of — Balance of probabilities — Whether there was sufficient evidence on balance of probabilities to prove that documentary credit applications were in fact submitted by defendants and wrongfully rejected by plaintiff

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Plaintiff in both civil suits sought to recover monies due and owing under various banking facilities afforded to its principal debtors, Fleur Chem Sdn Bhd ('Fleur Chem') and Rubytrend Sdn Bhd ('Rubytrend') who shared the same single office. In the first civil suit against Fleur Chem, the plaintiff bank had granted banking facilities comprising an overdraft facility and a trust receipt facility to Fleur Chem. These banking facilities were secured by a guarantee and indemnity executed by the second, third and fourth defendants in the first civil suit in favour of the bank. In the second civil suit against Rubytrend, the plaintiff had granted similar banking facilities comprising an overdraft facility and a trust receipt facility to Rubytrend. In like manner to Fleur Chem, the banking facilities afforded to Rubytrend were secured by a letter of guarantee executed by the second and third defendants in the second civil suit. The trust receipt facility for both Fleur Chem and Rubytrend specify that the tenor was 120 days while the overdraft facility was repayable on demand. Both Fleur Chem and Rubytrend had applied for and obtained an increase in their respective overdraft limits. The grant of the facilities and the fact that security was afforded by the guarantors was not disputed. However, the defendants claimed by way of their defence that the plaintiff bank had breached the terms of the banking facilities afforded to Fleur Chem

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A and Rubytrend by rejecting their respective applications for letters of credit on 5 November 1996 and 8 November 1996 respectively. The defendants therefore contended that they suffered great losses and were absolved from liability to the plaintiff by reason of the plaintiff's wrongful rejection of credit facilities. The defendants further submitted that by reason of the losses they suffered because of the plaintiff's said breach they were entitled to damages by way of counterclaim which exceeded the quantum claimed by the plaintiff.

B In support of the contention that the plaintiff had wrongfully rejected Fleur Chem's application for documentary credit, Fleur Chem's director testified that she had on 4 November 1996 faxed a documentary credit application together with a proforma invoice to the plaintiff bank. A fax activity report indicating the transmission of two pages to the bank was produced to support the director's oral testimony. The faxing of the application was then allegedly followed by the original being delivered by hand at the plaintiff bank's SS2 office.

C According to the testimony of the director this documentary credit application was rejected by one Ms Leong Fang Cit ('Ms Leong'), an officer of the bills department of the plaintiff bank without any reason. The bank denied such rejection and maintained that it had not received any such application from Fleur Chem. However, Ms Leong did not appear in court as the plaintiff was unsuccessful in its attempts to subpoena her. Again on 8 November, Rubytrend had sought to submit its documentary credit application which also had been allegedly rejected without reason. The two defendants submitted that the wrongful rejection of these documentary credit applications prevented them from proceeding with their manufacturing and trading business and that it caused their businesses to collapse.

D On 27 December 1996, the plaintiff bank required Fleur Chem and Rubytrend to regularise their respective overdraft accounts and to fully settle all overdue trust receipts failing which it would recall the entirety of the banking facility, but neither debtor company complied. Both defendant companies contended that they were under no obligation to do so in view of the plaintiff bank's breach in wrongfully rejecting their credit applications. Further the defendants also contended that the present legal action was commenced prematurely in that the bank had agreed to afford both companies reasonable time to repay the outstanding amount due under the trust receipt facility, which it did not, and that the overdraft facilities had been granted for a period of three years. The issues for determination in this case were whether the plaintiff bank's demand recalling the facilities granted to the defendants was premature and unwarranted as the tenure of the facilities was for a fixed term of three years; whether the bank had rejected the two documentary credit applications and therefore was in breach of the terms of the banking facilities afforded to Fleur Chem and Rubytrend; and whether the plaintiff bank was liable to the defendants by way of counterclaim for the losses suffered by them as a consequence of the rejection of the credit applications.

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Held, allowing the plaintiff's claim and dismissing the defendant's counterclaims with costs:

- (1) There was no fixed tenure specified in the agreement on the grant of the banking facilities to Fleur Chem and Rubytrend. There was however an express provision, in the agreement affording such facilities, that the facilities were repayable on demand and as such the bank was entitled to issue the demand for repayment and the defendants were bound to effect repayment as they had contracted. Further, the plaintiff bank in the instant case had called upon Fleur Chem and Rubytrend to regularise their accounts, namely to pay only overdue trust receipts and reduce the excess in the overdraft, but they had failed to comply. It was only upon the defendants' failure to comply that the bank finally recalled the facilities. There was no conflict in the provisions of the facilities agreements warranting the application of the *contra preferentum* rule in favour of the defendants. In the circumstances, the demand by the plaintiff and the legal action instituted against the defendants were not premature (see paras 40–43).
- (2) Despite the defendants contending that the bank's rejection had caused a near collapse of their business, neither Fleur Chem nor Rubytrend took any steps to immediately stipulate, albeit orally or in writing, that the plaintiff bank had acted wrongfully in rejecting their applications for credit and requiring it to rectify such wrongful rejection with immediate effect. Neither did they indicate to the plaintiff in any manner whatsoever that they considered such rejection to amount to a breach of the facilities agreements. In fact no mention was made by either defendant until after the plaintiff wrote to Fleur Chem and Rubytrend on 27 December 1996, and required them to regularise their respective overdraft accounts and to settle all overdue trust receipts. In the circumstances, the defendants' allegations of a breach of the banking facilities lacked basis and was relied upon as an afterthought as a consequence of the plaintiff bank's requirement that these entities regularise their accounts. On a consideration of the totality of the evidence, on a balance of probabilities there was no merit in the defendants' contention that the documentary credit applications were in fact submitted and wrongfully rejected by the plaintiff bank. In any event even if the plaintiff did reject the credit applications this did not amount to a cancellation of the banking facilities in toto without notice to the defendants and would not afford a complete defence to the plaintiff's claims against Fleur Chem and Rubytrend (see paras 52–58).
- (3) The counterclaims by the defendants were premised upon the wrongful rejection of the documentary credit applications but as there was no wrongful rejection of the applications and therefore no breach by the plaintiff bank there was no basis for the counterclaims lodged by the

- A defendants. Further the provision in the guarantee and indemnity provides that the guarantors shall not have the benefit of set-off and counterclaim until all moneys and liabilities of Fleur Chem and Rubytrend had been paid. As such, the guarantors were precluded from making any counterclaims and the same were therefore dismissed (see
- B paras 59–61).

[Bahasa Malaysia summary]

- C Plaintiff dalam kedua-dua guaman sivil menuntut untuk mendapatkan semula wang yang kena bayar dan terhutang di bawah pelbagai kemudahan perbankan yang diberikan kepada penghutang utamanya, Fleur Chem Sdn Bhd ('Fleur Chem') dan Rubytrend Sdn Bhd ('Rubytrend') yang berkongsi pejabat yang sama. Dalam guaman pertama terhadap Fleur Chem, bank
- D plaintiff telah memberikan kemudahan perbankan yang terdiri daripada kemudahan overdraf dan resit amanah kepada Fleur Chem. Kemudahan-kemudahan perbankan tersebut dijamin oleh jaminan dan tanggung rugi oleh defendan kedua, ketiga dan keempat dalam guaman sivil pertama bagi pihak bank. Dalam guaman kedua terhadap Rubytrend, plaintiff
- E memberikan kemudahan-kemudahan perbankan yang sama yang terdiri daripada kemudahan overdraf dan resit amanah kepada Rubytrend. Sepertimana Fleur Chem, kemudahan-kemudahan perbankan yang diberikan kepada Rubytrend dijamin oleh surat jaminan oleh defendan kedua dan ketiga dalam guaman sivil kedua. Kemudahan resit amanah untuk Fleur
- F Chem dan Rubytrend menyatakan bahawa tempohnya ialah 120 hari manakala kemudahan overdraf perlu dibayar apabila dituntut. Fleur Chem dan Rubytrend kedua-duanya memohon untuk dan mendapatkan peningkatan dalam had-had overdraf mereka. Pemberian kemudahan-kemudahan dan fakta bahawa jaminan diberikan oleh penjamin-penjamin tidak dipertikaikan. Walau bagaimanapun,
- G defendan-defendan mendakwa melalui pembelaan mereka bahawa bank plaintiff telah melanggar terma-terma kemudahan-kemudahan perbankan yang diberikan kepada Fleur Chem dan Rubytrend dengan menolak permohonan-permohonan mereka untuk surat-surat kredit pada 5 November
- H 1996 dan 8 November 1996. Oleh itu defendan-defendan menghujah bahawa mereka mengalami kerugian besar dan dibebaskan daripada liabiliti kepada plaintiff dengan alasan penolakan salah plaintiff terhadap kemudahan-kemudahan kredit. Defendan selanjutnya menghujah bahawa oleh kerana kerugian yang dialami mereka disebabkan pelanggaran plaintiff
- I maka mereka berhak untuk ganti rugi melalui tuntutan balas yang melebihi kuantum yang dituntut oleh plaintiff. Sebagai menyokong hujahan bahawa plaintiff secara salah menolak permohonan Fleur Chem untuk kredit berdokumen, pengarah Fleur Chem memberi keterangan bahawa dia, pada 4 November 1996 telah memfakskan permohonan kredit berdokumen

bersama dengan invoice proforma kepada bank plaintiff. Satu laporan aktiviti faks yang menunjukkan transmisi dua muka surat kepada bank dikemukakan untuk menyokong keterangan lisan pengarah. Permohonan yang difakskan itu didakwa diikuti dengan salinanasal dihantar melalui serahan tangan ke pejabat bank plaintiff di SS2. Menurut keterangan pengarah, permohonan kredit berdokumen ini ditolak oleh Cik Leong Fang Cit ('Cik Leong'), pegawai jabatan bil bank plaintiff tanpa apa-apa alasan. Pihak bank menafikan penolakan tersebut dan menegaskan bahawa mereka tidak menerima permohonan sebegitu daripada Fleur Chem. Walau bagaimanapun, Cik Leong tidak hadir ke mahkamah kerana plaintiff tidak berjaya menyerahkan sepina kepadanya. Sekali lagi pada 8 November, Rubytrend memohon untuk memasukkan permohonan kredit berdokumen yang telah ditolak tanpa apa-apa alasan. Kedua-dua defendan menghujah bahawa penolakan salah permohonan kredit berdokumen menghalang mereka daripada meneruskan dengan perniagaan pembuatan dan perdagangan dan ini menyebabkan perniagaan mereka jatuh merudum. Pada 27 Disember 1996, bank plaintiff meminta Fleur Chem dan Rubytrend untuk menyelaraskan akaun overdraf mereka dan menyelesaikan sepenuhnya kesemua resit amanah lampau tempoh di mana kegagalan berbuat demikian akan menyebabkan kesemua kemudahan perbankan ditarik balik, tetapi kedua-dua syarikat penghutang tidak mematuhi. Kedua-dua syarikat defendan menghujah bahawa mereka tidak berkewajipan untuk berbuat demikian memandangkan pelanggaran bank plaintiff secara salah menolak permohonan-permohonan kredit mereka. Selanjutnya defendan-defendan juga menghujah bahawa tindakan undang-undang ini dimulakan pramatang iaitu pihak bank telah bersetuju untuk memberikan masa kepada kedua-dua syarikat untuk membayar jumlah yang belum dijelaskan di bawah kemudahan resit amanah, yang mana bank bertindak sebaliknya, dan bahawa kemudahan-kemudahan overdraf telah diberikan untuk tempoh tiga tahun. Isu-isu untuk ditentukan dalam kes ini ialah sama ada tuntutan bank plaintiff untuk menarik balik kemudahan-kemudahan yang diberikan kepada defendan-defendan pramatang dan tidak wajar memandangkan tempoh kemudahan-kemudahan adalah untuk tempoh tetap tiga tahun; sama ada bank telah menolak kedua-dua permohonan kredit berdokumen dan oleh itu melanggar terma-terma kemudahan perbankan yang diberikan kepada Fleur Chem dan Rubytrend; dan sama ada bank plaintiff bertanggungjawab kepada defendan-defendan melalui tuntutan balas untuk kerugian yang dialami mereka sebagai akibat penolakan permohonan-permohonan kredit.

Diputuskan, membenarkan tuntutan plaintiff dan menolak tuntutan balas defendan-defendan dengan kos:

- (1) Tiada tempoh tetap yang dinyatakan dalam perjanjian terhadap pemberian kemudahan-kemudahan perbankan tersebut kepada Fleur

- A Chem dan Rubytrend. Walau bagaimanapun terdapat peruntukan tersurat dalam perjanjian yang memberikan kemudahan-kemudahan tersebut, bahawa kemudahan-kemudahan tersebut kena dibayar apabila dituntut dan oleh itu defendan-defendan terikat untuk membuat pembayaran balik sepertimana yang dikontrakkan oleh mereka.
- B Selanjutnya, bank plaintif dalam kes ini meminta Fleur Chem dan Rubytrend untuk meregulasasikan akaun mereka, iaitu membayar hanya resit amanah lampau tempoh dan mengurangkan lebihan dalam overdraf, tetapi mereka gagal mematuhiinya. Apabila defendan-defendan gagal untuk patuh, barulah pihak bank akhirnya menarik balik kemudahan-kemudahan tersebut. Tiada konflik dalam peruntukan-peruntukan perjanjian kemudahan yang mewajar penggunaan prinsip *contra preferentum* terhadap defendan-defendan. Dalam keadaan ini, tuntutan oleh plaintif dan tindakan undang-undang yang dimulakan terhadap defendan-defendan bukanlah pramatang (lihat perenggan 40–43).
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- (2) Di sebalik hujahan defendan-defendan bahawa penolakan bank hampir menyebabkan kejatuhan perniagaan mereka, Fleur Chem mahupun Rubytrend tidak mengambil apa-apa langkah untuk menetapkan, secara lisan ataupun bertulis, bahawa bank plaintif telah bertindak secara salah dalam menolak permohonan mereka untuk kredit dan meminta bank plaintif memperbaiki penolakan salah tersebut dengan serta-merta. Mereka juga tidak menyatakan dalam apa-apa cara kepada plaintif bahawa mereka menganggap penolakan tersebut sebagai pelanggaran perjanjian-perjanjian kemudahan. Sebenarnya, tiada pernyataan yang dibuat oleh mana-mana defendan sehingga selepas plaintif menulis kepada Fleur Chem dan Rubytrend pada 27 Disember 1996, dan meminta mereka menyelaraskan akaun-akaun overdraf mereka dan menyelesaikan kesemua resit amanah lampau tempoh.
- E
- F Dalam keadaan ini, dakwaan defendan-defendan mengenai pelanggaran kemudahan-kemudahan perbankan adalah tidak berasas dan digunakan sebagai fikir semula akibat daripada keperluan bank plaintif bahawa entiti-entiti tersebut menyelaraskan akaun mereka. Atas keseluruhan pertimbangan keterangan, tidak terdapat merit atas imbalan kebarangkalian dalam hujahan defendan-defendan bahawa permohonan kredit berdokumen dikemukakan dan ditolak secara salah oleh bank plaintif. Walau bagaimanapun sekiranya plaintif memang menolak permohonan-permohonan kredit tersebut, ia tidak menyebabkan pembatalan kemudahan-kemudahan perbankan sepenuhnya tanpa notis kepada defendan-defendan dan tidak memberikan pembelaan sempurna kepada tuntutan plaintif terhadap Fleur Chem dan Rubytrend (lihat perenggan 52–58).
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- (3) Tuntutan balas oleh defendan-defendan dipremiskan atas penolakan salah permohonan kredit berdokumen tetapi memandangkan tidak

terdapat penolakan salah permohonan-permohonan tersebut dan oleh itu tiada pelanggaran oleh bank plaintif maka tiada asas untuk tuntutan balas oleh defendan-defendan. Selanjutnya peruntukan dalam jaminan dan tanggung rugi memperuntukan bahawa penjamin-penjamin tidak mempunyai kelebihan faedah penolakan dan tuntutan balas sehingga semua wang dan liabiliti Fleur Chem dan Rubytrend dibayar. Oleh itu, penjamin-penjamin dikecualikan daripada membuat tuntutan balas dan oleh itu tuntutan balas ini ditolak (lihat perenggan 59–61).]

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Notes

For cases on banks and banking business generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

C

For cases on standard of proof generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2289–2294.

Cases referred to

D

American Express Sdn Bhd v Dato Wong Kee Tat & Ors [1990] 1 MLJ 91, SC (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)

Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137; [1992] 3 CLJ 1519, SC (distd)

E

Imperial Steel Drum Manufacturers Sdn Bhd v Wong Kin Heng [1997] 2 SLR 695, HC (refd)

Titford Property Co Ltd v Cannon Street Acceptance Ltd (1975) (Unreported) (foldd)

F

Westco Motors (Distributors) Pty Ltd v Palmer [1979] 2 NSWLR 93 (refd)

Legislation referred to

Evidence Act 1950 s 32

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CS Mong (Leong Wen Ni with him)(Lee Hishammuddin Allen & Gledhill) for the plaintiff.

YL Tho (YL Tho Ng & Partners) for the defendants.

Nallini Pathmanathan JC:

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INTRODUCTION

[1] Civil Suit No D2–22–419 of 1997 ('the Fleur Chem suit') and Civil Suit No D2–22–420 of 1997 ('the Rubytrend suit') were consolidated for the purposes of trial vide order dated 10 February 2004. The trial proceeded for three days from 25 May 2009 to 27 May 2009. The plaintiff, Malayan Banking Bhd, ('the bank') called two witnesses in support of its case, while the defendants called two witnesses in support of the defence and

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A counterclaim. The court ruled at the outset that trial on the counterclaims filed in both actions would be confined to liability only. If liability were established, damages were to be assessed by the registrar.

B [2] At trial in the Fleur Chem suit, the bank withdrew the action against the second and third defendants as they had been adjudicated bankrupt. The Fleur Chem suit therefore proceeded only against the first defendant, Fleur Chem Sdn Bhd ('Fleur Chem') and the fourth defendant and guarantor, Shia Lim. As for the Rubytrend suit, the bank withdrew the action against the second defendant as she had been adjudicated bankrupt. The Rubytrend suit proceeded against the first defendant in that suit, namely Rubytrend Sdn Bhd ('Rubytrend') and the third defendant, Chin Ping Sang ('Chin').

D [3] Vide the two suits, the bank seeks to recover from the principal debtors, Fleur Chem and Rubytrend, monies due and owing under various banking facilities afforded to the two companies. The claim against Fleur Chem amounts to RM1,734,562.76 (as at 31 March 1997) and is guaranteed by, inter alia, Shia Lim, while the claim against Rubytrend amounts to RM3,317,603.93 and is guaranteed, inter alia, by Chin. The grant of the facilities and the fact that security is afforded by, inter alia, Shia Lim and Chin is not disputed.

E [4] However the defendants claim by way of defence that the bank breached the terms of the banking facilities afforded to Fleur Chem and Rubytrend by rejecting their respective applications for letters of credit on 5 November 1996 and 8 November 1996 respectively. As a consequence it is
F contended that they suffered great losses as the two companies were unable to run their businesses due to lack of funding. The net result, the defendants contend, is that Fleur Chem and Rubytrend are absolved from liability to the bank by reason of the bank's said breach. Fleur Chem and Rubytrend further
G arising from the wrongful rejection of credit facilities, they are entitled to damages by way of counterclaim which exceeds the quantum claimed by the bank.

H [5] The defendants also contend that the present legal action was commenced prematurely in that the bank had agreed to afford both companies reasonable time to repay the outstanding amount due under the trust receipt facility, which it did not. It is further contended by the defendants that the banking facilities granted by the bank is for a period of three years.

I [6] The issues that arise for consideration are as follows:

- (a) Has the bank established its claim that Fleur Chem utilised banking facilities to the extent of RM1,734,562.76 and that Rubytrend utilised the sum of RM3,317,603.93?

- (b) Was the bank entitled to issue a demand recalling the facilities granted to both Fleur Chem and Rubytrend or was the demand premature and unwarranted as the tenure of the facilities was for a fixed term of three years? A
- (c) Did the bank reject the documentary credit applications made by Fleur Chem and Rubytrend on behalf of Fleur Chem on 4, 5 and 8 November 1996? B
- (d) If the bank did breach the terms of the banking facilities afforded to Fleur Chem and Rubytrend, what is the effect of this breach? Does such breach absolve the defendants from repayment of the monies advanced by the bank under the various facilities afforded to the companies? C
- (e) Is the bank liable to the defendants by way of counterclaim for the losses suffered by Fleur Chem and Rubytrend as a consequence of the rejection of the letters of credit? D

SALIENT FACTS

[7] It is not in dispute that the bank vide letters of offer dated 7 March 1996 (exh P1), 23 March 1996 (exh P2) and 29 March 1996 (exh P3) granted banking facilities to Fleur Chem comprising an overdraft facility and a trust receipt facility. These letters of offer were duly accepted by Fleur Chem as evidenced by the signature of the third defendant, a director of Fleur Chem. E

[8] The salient terms of the overdraft facility as set out in the letters of offer included the following: F

- (a) That the overdraft facility is payable on demand (see cl 1.5(a)(i) of exh P1). G
- (b) That the bank is entitled to impose interest on this facility at the rate of 1.5%pa above the bank's base lending rate (or other rates imposed by the bank from time to time) on monthly rests (see cll 1.1 and 1.5(a)(ii) of exh P1). H
- (c) The bank is entitled to vary the limit of the overdraft facility at any time during the validity of the CGC (see cl 1.3(d) of exh P1). I
- (d) On default Fleur Chems is to pay interest on overdue sums at the rate of 4% above BLR on monthly rests up to date of actual payment (see cl 1.3(d) of exh P1).

As for the trust receipt facility:

- (e) The maximum tenor of the trust receipt facility is 120 days (see cl 1.5(vi) of exh P1).

- A** (f) The bank is entitled to impose interest of 2%pa above the bank's BLR (see cl 1.1 of exh P1).
- (g) On default the plaintiff is entitled to impose an additional 1% interest to be compounded monthly (see cl 1.5(b) of exh P1).
- B** (h) The bank is entitled to recall or cancel the banking facilities at any time or if any event of default occurs which will result in the whole amount becoming due and repayable immediately.
- C** [9] It is also not in dispute that the banking facilities afforded to Fleur Chem were secured by a guarantee and indemnity dated 3 May 1996 executed by the second and third defendants and Shia Lim in favour of the bank. They guaranteed to pay on demand all monies due and owing by Fleur Chem to the bank up to the principal sum of RM3,300,000 together with interest accruing at rates stipulated by the bank. Additionally a further security of a fixed deposit of RM200,000 was placed by the third defendant with the bank which is subject to the terms of a memorandum of deposit and a letter of set off, both dated 3 May 1996 and executed by the third defendant.
- D**
- E** [10] Similarly the bank vide letters of offer dated 23 August 1995 (exh P23), 6 March 1996 (exh P24) and 25 July 1996 (exh P25) granted banking facilities also comprising an overdraft facility and a trust receipt facility to Rubytrend. These facilities were accepted as evidenced by the signature of the second defendant, Chan Mew Yew as director of Rubytrend.
- F** The terms of these facilities were similar to that outlined for Fleur Chem and are set out in exh P24.
- G** [11] In like manner to Fleur Chem the banking facilities afforded to Rubytrend were secured by a letter of guarantee dated 3 May 1996 executed by the second defendant and Chin. The terms of the guarantee and indemnity were similar to those in the guarantees in the Fleur Chem suit. Additionally a fixed deposit of RM1,050,000 was placed by the second defendant which was subject to two memorandums of deposit and two letters of set-off dated 3 May 1996 and 21 August 1996 respectively.
- H**
- I** [12] The foregoing evidence relating to the grant of facilities was given by one Tan Pet Heong, ('PW1') who was at the material time the branch manager of the Pacific Bank Bhd at one of its branches in Petaling Jaya, where Fleur Chem and Rubytrend had procured banking facilities.
- [13] The facilities had been approved by the head office and PW1 had been instructed to liaise with these customers. PW1 was acquainted with their accounts and liaised primarily through Shia Lim.

[14] Chan Mew Yew DW1, the third defendant in the Fleur Chem suit and the second defendant in the Rubytrend suit, testified otherwise in relating to the grant of facilities by the bank to Fleur Chem and Rubytrend. She maintained that the facilities afforded to the two companies was in fact a term loan for three years based, inter alia, on the relevant clauses stated therein and upon her understanding of the same. For example vis a vis Rubytrend, DW1 relied on cl 7 in exh P23 which provides under the heading 'Main Terms and Conditions' as follows:

The bank reserves the right to vary the facilities limit at any time during the validity period of the CGC guarantee i.e. validity of the guarantee is only for three years.

And cl 4 provides that:

The company is to furnish us a copy of its latest audited/certified financial statement within six (6) months after the close of each financial year.

[15] On the basis of these clauses, DW1 maintained that the tenure of the loan facilities accorded to Rubytrend was for a fixed term of three years.

[16] Clause 5 provides that:

The facility, interest thereon and all other outstanding sums are repayable on demand.

while cl 7 provides that:

The overdraft facility is repayable on demand and interest is to be serviced monthly in arrears.

[17] Notwithstanding these clauses, DW1 maintained that the overdraft facility is for a fixed term and cannot be withdrawn without reason and notice.

[18] Returning to the history of the two accounts, on or about 29 May 1996, Fleur Chem requested for, and was granted an overdraft facility of RM600,000 for a period of three months from 5 June 1996 to 4 September 1996. This had the effect of increasing the overdraft facility from RM200,000 to RM800,000. The bank maintains that this overdraft facility was temporary while Fleur Chem and Shia Lim dispute this. This facility was 'earmarked' against the foreign letter of credit facility that had previously been made available to Fleur Chem. The net result was that with the availability of this overdraft facility of RM600,000, the authorised limit of the letter of credit facility would be reduced by a corresponding sum of RM600,000. This

- A** overdraft facility which the bank deemed to be temporary was subject to the terms and conditions applicable to the original overdraft facility in exh P1 save that interest was levied at the rate of 4%pa above the bank's BLR. The grant of this overdraft facility is evidenced only by an internal memorandum dated 25 September 1996. On the expiry of this overdraft facility which had
- B** been granted for a period of three months, the bank, at Fleur Chem's request granted a further extension of three months for the utilisation of this facility until 4 December 1996.
- C** [19] In the interim on or about 6 August 1996, at the request of Rubytrend, the bank also approved an overdraft facility in the sum of RM400,000 for a period of three months from 6 August 1996 to 6 November 1996. As such the overdraft facility for Rubytrend was increased from RM1,350,000 to RM1,750,000. As with Fleur Chem there was no
- D** letter confirming the increase in limit. Again this overdraft facility was earmarked against the foreign letter of credit facility which had previously been made available to Rubytrend. As a consequence the authorised limit of the letter of credit facility was correspondingly reduced by the sum of RM400,000. Again as with Fleur Chem, this overdraft facility was subject to
- E** the terms and conditions applicable to the overdraft facility as set out in exh P25, save that interest was levied at the rate of 4% above the bank's BLR. The grant of this facility is also evidenced by an internal memorandum dated 6 August 1996. On the expiry of this facility on 6 November 1996, the bank granted an extension of a further three months for the overdraft facility to
- F** Rubytrend, ie until 6 February 1997.
- G** [20] On 4 November 1996 the third defendant, Chan Mew Yew, DW1 testified that she faxed to the bank a documentary credit application form for Fleur Chem together with a proforma invoice from one Filthai Company Ltd as well as a documentary credit application dated 4 November 1996. In support, PW2 referred to a fax activity report for Rubytrend for 4 November 1996 indicating the transmission of two pages to the bank. She explained that she had used Rubytrend's facsimile machine because both Rubytrend and Fleur Chem shared the same fax machine as they did their single office. The
- H** faxing of the application was followed by the original being delivered by hand by Shia Lim, DW3, at the bank's SS2 office. DW1 explained that it was the normal procedure for Fleur Chem and Rubytrend to fax the documentary credit application first followed by the original being delivered by hand to the bank's SS2 office. According to DW1 the documentary credit application was
- I** rejected by one Ms Leong Fang Cit of the bills department of the bank without any reason. The bank denied such rejection as they maintained that the bank had not received any such application from Shia Lim. However Ms Leong Fang Cit did not appear in court as the bank was unsuccessful in its attempts to subpoena her.

[21] Again on 8 November 1996, Shia Lim testified that he sought to submit a documentary credit application for Rubytrend on behalf of Fleur Chem, to Choong Nyuk Chin, PW2 at the Bank. DW2 and Shia Lim testified that PW2 rejected the application without reason. PW2 however, denies that she met Shia Lim that day. Accordingly the bank maintains that it could not have, and did not, reject the documentary credit application. The defendants contend that the bank's rejection of these two applications for documentary credit is wrongful and amounts to a breach of the terms and conditions of the grant of the facilities to Fleur Chem and Rubytrend, thereby absolving them of liability for the repayment of the facilities afforded by the bank. They maintain that this is so because they could not proceed with the manufacture of cigarettes and trading in the same as they could not afford to purchase the requisite raw materials from their suppliers to manufacture sufficient quantities of cigarettes to meet the demands of their buyers. They further contend that the businesses of Fleur Chem and Rubytrend collapsed as a consequence of this 'wrongful' rejection of the documentary credit applications.

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[22] In the interim on 29 November, 3, 4, 7, 23, 26 and 31 December 1996 the tenor of six different trust receipts for Fleur Chem expired. On 7 and 29 November, 18 and 29 of January and 11 February 1997, the tenor of five different trust receipts for Rubytrend also expired. DW1 testified that the bank had, sometime in October 1996, given the companies reasonable time after the lapse of 120 days or after the expiry of the due dates for the trust receipts, to settle the same. In her evidence DW1 gave evidence of examples of the instances where both Fleur Chem and Rubytrend were allowed to settle the trust receipts within a reasonable time after the lapse of 120 days or after the expiry of the due dates of the trust receipts.

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[23] On 27 December 1996 the bank required Fleur Chem to regularise the overdraft account and to fully settle all overdue trust receipts. Neither Fleur Chem nor Rubytrend did so. They contended that they were under no obligation to do so in view of the bank's breach in wrongfully rejecting their documentary credit application forms as outlined above. As a consequence, on 16 January 1997 the bank, through its solicitors, recalled the banking facilities afforded to Fleur Chem and demanded payment of the sum of RM2,181,208.30 from it. In response Fleur Chem through its solicitors vide letter dated 31 January 1997, maintained that the bank had wrongfully withdrawn its banking facilities in breach of the letters of offer dated 6 March 1996 and 25 July 1996.

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- A [24] On 3 February the bank recalled the banking facilities afforded to Rubytrend and demanded payment of RM4,249,454.26. The bank also demanded payment of the same amount from the second defendant, PW2 and Chin.
- B [25] On 3 March 1997 the bank denied that it had wrongfully withdrawn the banking facilities as alleged by the defendants. On 24 March 1997 the bank proceeded to give notice to PW2 that it intended to uplift the fixed deposits placed as security for both the Fleur Chem and Rubytrend accounts.
- C The bank proceeded with the upliftment of the fixed deposits securing both accounts on 1 April 1997 despite the defendants alleging that any such upliftment would be wrongful. Having set these amounts off, the bank then proceeded to make claim against the various defendants in both suits for recovery of the balance sum. The defendants as outlined above maintain that
- D the bank, by rejecting the documentary credit applications by Fleur Chem and Rubytrend on behalf of Fleur Chem on 4, 5 and 8 November 1996, is in breach of the agreement reached between the parties in relation to the provision of banking facilities. As a consequence it is further contended that
- E there is therefore no liability on the part of Fleur Chem and Rubytrend (and thereby the guarantors) to repay the bank the amount outstanding. However as the two companies suffered loss and damage by reason of the wrongful refusal of facilities, Fleur Chem and Rubytrend maintain that they are entitled to damages by way of counterclaim in a sum which reduces
- F substantially, or exceeds the amount claimed by the bank.

[26] It is relevant that for the purposes of this suit, there is no dispute about the proof of quantum claimed by the bank. The defendants deny liability for that sum for the reasons set out above.

G
ISSUES

- H *Issue (i) Has the bank established that its claim against Fleur Chem and thereby Shia Lim (guarantor) is in the sum of RM1,734,562.76 and against Rubytrend and thereby Chin (guarantor) in the sum of RM3,317,603.93?*

- I [27] The bank's claim against Fleur Chem is premised on amounts due and owing under the overdraft facility and trust receipts. The amount due and owing under the trust receipts for both Fleur Chem and Rubytrend is not in dispute (see statement of agreed facts, paras 10 and 12 in each suit). The quantum claimed under the overdraft facility is shown in the bank statements dated 31 March 1997 (exh P12E) and 30 April 1997 (exh P39K) respectively. Further and in any event the bank produced two certificates of indebtedness

specifying the amounts due under each account and providing a breakdown of the sums owing under the overdraft facility and the trust receipts (see exh P49).

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[28] On 1 April 1997 the bank uplifted the fixed deposit placed by DW1 in the sum of RM200,000 for the Fleur Chem account, and the sum of RM1,087,878.44 for the Rubytrend account, and utilised the said sums to reduce the amount due and owing by Fleur Chem and Rubytrend. The defendants responded through their solicitors maintaining that the upliftment and set-off was wrongful.

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[29] As a consequence of the deduction of the deposits, the amount due and owing by Fleur Chem to the bank is RM1,734,562.76 together with interest as at 31 March 1997, while the amount due and owing by Rubytrend to the bank is RM3,317,603.93 together with interest as at 4 April 1997. To that extent the bank has established the amount claimed against Fleur Chem and Rubytrend.

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Issue (ii) Was the bank entitled to issue a demand recalling the facilities granted to both Fleur Chem and Rubytrend or was the demand premature and unwarranted as the tenure of the facilities was for a fixed term of three years?

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[30] This issue turns on the tenure of the banking facilities. A perusal of the agreement vide the various letters of offer issued and accepted by Fleur Chem and Rubytrend do not disclose any specific term for the facilities. The trust receipt facility for both Fleur Chem and Rubytrend specify that the tenor is 120 days. Clause 1.5 of exh P1 (as outlined above in para 2.3) stipulates with respect to the overdraft facility that it is repayable on demand. From the chronology of events it is evident that at the time when the bank issued its letter of 27 December 1996, it required all overdue trust receipts and the excess in the overdraft facilities afforded to each entity to be regularised. The bank went on to state that in the event there was a failure to comply, it would recall the entirety of the banking facilities (see exh PW1, A15).

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[31] Was this premature? Was the bank entitled to issue the said letter?

TRUST RECEIPTS

[32] Turning first to the trust receipts, DW1 in her testimony stated that both Fleur Chem and Rubytrend were given an extra fourteen days after the expiry of 120 days of the due date of the trust receipts to settle the same. In support of this statement, DW1 referred to the various trust receipts and their dates of expiry as well as the respective dates when they were settled. There

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A were certainly several instances when trust receipts had been paid fourteen days after the due date. The defendants went on to state that the bank's own letter of 27 December 1996 reinforced this fact. PW1 also agreed that both companies had been accorded time in excess of the specified 120 days to settle their trust receipts. Even when the bank issued its letter of 27 December 1996
B requiring the defendants to regularise, inter alia, the overdue trust receipts, it did not proceed to recall the facilities until 20 days after this letter, on 16 January 1997 in the case of Fleur Chem and five weeks or 35 days after its letter on 3 February 1997 for Rubytrend. In short, the defendants were
C accorded a considerable amount of time after expiry of the trust receipts to settle the same. Although it can therefore be said that the tenor of 120 days was not strictly adhered to by the bank, it cannot be concluded from the history of settlement of the trust receipts that there existed an agreement whereby the bank extended the time for settlement of the trust receipts beyond a period of 14 days after expiry of the same. In the instant case, the
D bank waited more than fourteen days after the expiry of the respective trust receipts before demanding for settlement of the same. As such it cannot be concluded that the demands for the settlement and subsequent recall of the trust receipt facility was wrongful or premature.

E [33] However DW1 and DW2 went further to contend that by reason of the bank's breach in wrongfully rejecting the documentary credit applications of Fleur Chem, neither Fleur Chem nor Rubytrend were bound to respond to the bank's letter of 27 December 1996 or any other letters specifying
F alleged breaches. The issue of whether or not the bank did breach the facility agreements by rejecting the documentary credit applications is dealt with subsequently. However, even if there was such a 'breach' by the bank, this does not absolve Fleur Chem and Rubytrend entirely from their liability under the trust receipts. While any such breach may well afford Fleur Chem and Rubytrend the opportunity to seek damages, it cannot provide a
G complete defence to the bank's claim for a return of monies loaned.

H [34] The defendants also contend that the letter of 27 December 1996 issued by the bank was an afterthought and an attempt to 'cover-up' the bank's own breaches. This contention does not appear to have merit because it is evident that the bank was merely requiring the defendants to rectify and regularise their overdue accounts. The subsequent letters sought to recover monies that it had loaned to these entities. This the bank is fully at liberty to do.

I
OVERDRAFT FACILITY

[35] With respect to the overdraft facility, Fleur Chem, Rubytrend and the guarantors maintain that the bank's demand for repayment is premature as

the facilities were afforded for a fixed term of three years. As stated above, cl 1.5 of exh P1, the agreement affording such facilities, provides that the overdraft facility is repayable on demand. Rubytrend relies on the following clauses in the agreements affording the facilities to contend that the overdraft facility has a fixed tenure of three years:

Clause 7 – ‘Main Terms And Conditions’

The bank reserves the right to vary the facilities limit at any time during the validity period of the CGC guarantee i.e. validity of the guarantee is only for three years.

Clause 4 – The company is to furnish us with a copy of its latest audited/certified financial statement within six (6) months after the close of each financial year.

[36] Rubytrend through DW1 and DW2 so contends notwithstanding the existence of the following clauses:

Clause 5 – The facility, interest thereon and all other outstanding sums are repayable on demand.

Clause 7 – The overdraft facility is repayable on demand and interest is to be serviced monthly in arrears.

[37] It is contended that cll 5 and 7 were in conflict with cll 7 and 4, and applying the contra proferentem rule in favour of the defendants, the tenure of the facility should be construed to mean a term of three years. In support of this contention learned counsel for the defendants cites, inter alia, *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137; [1992] 3 CLJ 1519; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76.

[38] First, cll 7 and 4 require perusal. Do they provide that the tenure of the loan is for a term of three years? A perusal of the same will show that cl 7 deals with the bank’s right to vary the limit of the facilities granted during the validity of the CGC guarantee which is stated to be three years. In short the tenure of the CGC guarantee is stated to be three years, not the tenure of the banking facilities. This clause does not therefore provide that the overdraft facility is for a fixed term of three years.

[39] Clause 4 in turn requires the company to provide its audited statements within six months of the close of each financial year. It therefore envisages that where the facility extends for a year or more, then the company is bound to provide its audited accounts. This clause also does not provide, albeit expressly or impliedly, for a fixed tenure of three years. In the absence of any provision stipulating a tenure or fixed term for the grant of these

- A facilities, it is not possible to conclude that the tenure of the facilities afforded to Rubytrend was for a term of three years.

[40] In the absence of a provision stipulating the tenure of the facilities, the further contention that a conflict arises in view of cll 5 and 7, does not arise. As no conflict arises, the issue of the application of the contra proferentem rule is also inapplicable. The instant case is to be contrasted with the facts in *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* where there was a clear and express provision that the tenure of the facility was for 36 months. There was also a clause stipulating that all moneys due were payable on demand. It was in the face of this apparent contradiction in terms of the loan facility that the court relying on the English case of *Titford Property Co Ltd v Cannon Street Acceptance Ltd* (unreported) adopted the statements of Goff J who decided that as the bank had contracted with the customer for a fixed term leading to the customer committing himself, the bank could not at the same time simply require repayment on demand at any time. Here there is no provision for a fixed term for the facilities granted. To read cll 7 and 4 as conferring a fixed tenure of three years would be to adopt an unreasonable construction of those clauses.

E [41] Again in *Bank Bumiputra Malaysia Kuala Terengganu v Mae Perkayuan Sdn Bhd* there was a typescript paragraph added to the facility letter which provided for a specified period for the facilities, while other parts of the letter provided that the facility was repayable on demand. Here there are no words express or implied, stipulating a fixed term for the grant of facilities to either F Fleur Chem or Rubytrend. Neither is there any credible evidence of the existence of any ancillary agreement to the effect that the facilities were for a fixed term of three years.

G [42] The position is the same for Fleur Chem where there is a clause identical to cl 7 above, namely cl 1.3(d) in exh P1. Similarly cl 1.6(a) in the Fleur Chem agreement is identical to cl 4 of the Rubytrend agreement. Again cll 1.5 and 1.6 in the Fleur Chem agreement are identical to cll 5 and 7 respectively in the Rubytrend agreement. As such the same conclusion is drawn, namely that the bank is entitled to demand repayment whereupon Fleur Chem is bound to effect repayment, as it has contracted.

I [43] In summary there is no fixed tenure specified in the agreement on the grant of the facilities. There is however, in view of cll 5 and 7 an express provision that enables the bank to demand that the facility be repaid whereupon Fleur Chem and Rubytrend are bound to do so, as they have contracted. As such no conflict arises, as in the cases cited above, warranting the application of the contra proferentum rule as submitted by learned counsel for the defendants. In light of the clear express provisions, the

facilities are repayable on demand. It should also be pointed out that the bank in the instant case, called upon Fleur Chem and Rubytrend to regularise their accounts, namely to pay only overdue trust receipts and reduce the excess in the overdraft, not to make repayment in full vide their letter of 27 December 1996. It was only when they failed to regularise their accounts that the bank finally recalled the facilities. In these circumstances it does not follow that the demands from the bank were premature. Under the terms of the facility agreements with the two companies, the bank was entitled to issue the demand for repayment.

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[44] A further contention put forward by learned counsel for the defendants related to estoppel and variation. It is contended that the bank by consenting to the increase in the overdraft facilities of Fleur Chem and Rubytrend by RM600,000 and RM400,000 as well as granting these debtors an extension of time to settle their trust receipts after they had fallen due, had effectively varied the terms of the bank facilities. It is further submitted that as such, the bank has waived the terms under the original facilities and is now estopped from enforcing the original terms. Additionally the conduct of the bank reinforces the principle of estoppel.

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[45] The increase in the overdraft facilities it will be recalled was earmarked against the letter of credit facilities such that their limits were accordingly reduced by the corresponding amount of increase of the overdraft limits. The bank had expressly reserved the right to so vary the facilities limit vide cl 1.3(d) of the Fleur Chem agreement and cl 7 of the Rubytrend facility. As such the variation of the limits of the overdraft facilities was within the purview of, and envisaged by the terms of the facilities agreements. It therefore follows that such a variation expressly envisaged and reserved under the terms of the facilities agreements does not waive the original terms. Neither does it give rise to estoppel.

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[46] In fact PW1 strenuously denied that he had accorded an extension of time to the defendants on repayment of the trust receipts. An analysis of the due dates and the dates paid shows that the defendants were in fact accorded an extension of time to settle the trust receipts, of up to 14 days on several occasions.

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Issue (iii) Did the bank reject the documentary credit applications made by Fleur Chem and Rubytrend on behalf of Fleur Chem on 4, 5 and 8 November 1996?

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Issue (iv) If the bank did breach the terms of the banking facilities afforded to Fleur Chem and Rubytrend, what is the effect of this breach? Does such breach absolve the defendants from repayment of the monies advanced by the bank under the various facilities afforded to the companies?

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[47] As outlined above in the course of examining the chronology of

- A events, DW1 testified that she had on 4 November 1996 faxed a copy of the documentary credit application dated the same day together with an invoice from Filthai Co Ltd to the bank. DW1 provided a facsimile transmission activity report in support of this contention. As is the customary practice, the original application was delivered by hand to the bank's SS2 office by DW2, B Shia Lim, the following day, namely 5 November 1996. DW2 stated that the documentary credit application was rejected by Leong Fang Chit.

- C [48] The bank on the other hand contends that it did not receive this documentary credit application form. Both PW1, Tan Pet Leong and PW2, Choong Nyuk Chin denied any knowledge of such an application on 4 and 5 November 1996. There are no records in the bank of the submission of such an application. Further the bank contends that if indeed such an application was made on 4 November 1996 it would have been for the purposes of purchasing raw materials to fulfil an order from a purchaser. D However the only order produced by Fleur Chem was dated 27 February 1997, well after the date of application. It is therefore contended that Fleur Chem's allegation is untrue in that the purchase order should precede the documentary credit application and not the reverse.

- E [49] The most pertinent witness to testify on this matter would have been Ms Leong Fang Chit, but she was not present in court as the bank had been unsuccessful in its attempts to subpoena her. Learned counsel for the bank sought to have Ms Leong's affidavit affirmed in relation to this issue, F introduced in evidence under the provisions of s 32 of the Evidence Act 1950. The court had ruled that the admissibility of this affidavit would be considered in the course of submissions. Having considered the entirety of the facts, this court declines to admit Ms Leong's affidavit in evidence. This is primarily because all attempts to locate Ms Leong were made very close to, G and during trial. Efforts to procure Ms Leong's presence should be have been commenced and followed up well before trial.

- H [50] Moreover such evidence as was given by the bank's solicitors' process servers revealed that Ms Leong did indeed live at the address they had gone to, but was away tending to her sick mother in another state. It cannot therefore be concluded that Ms Leong could not be located.

- I [51] Subsequently on 8 November 1996, DW2 testified that a further attempt was made to submit a documentary credit application in original form to PW2, Choong Nyuk Chin at the bank's SS2 office by Rubytrend on behalf of Fleur Chem. PW2 on the other hand was certain in her evidence that she never received any such application nor even saw DW2 on 8 November 1996. She testified that she was not the person to whom such applications were handed in, and that she had in any event no authority to

approve or reject such applications. The evidence of the bank's witnesses was therefore directly contradictory to that of DW1 and DW2.

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[52] What then is the effect of the evidence in totality? DW1 and more significantly DW2 maintain that the documentary credit application for Fleur Chem was handed in, once by facsimile and the original by hand. It is further contended that a second application was made two days later on 8 November 2000 by hand. The bank however contends that it never received either of these applications. In so far as the first application is concerned, in the absence of Ms Leong, it is difficult for this court to determine whether there is any basis to the bank's contention that Ms Leong did not receive, let alone reject Fleur Chem's application which DW2 claims to have handed in. There is however nothing in writing from the bank rejecting any such application. On the other hand, DW1 and DW2 were unshaken in their testimony that they did in fact submit by facsimile and hand, a documentary credit application for Fleur Chem on 4 and 5 November respectively.

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[53] With respect to the submission of the second documentary credit application, PW2 remained unshaken that she had not received any such application as she had not even seen DW2 on the 8 November 1996. On the other hand DW2 was certain that he had met PW2 and that she had rejected the application. Again there is nothing in writing to bear out such rejection. In the face of such directly contradictory evidence from both sets of witnesses, it is difficult for this court to decide with any degree of certainty which sets of testimony are to be preferred namely, DW1 and DW2 or that of PW2 and PW1.

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[54] However what appeared to be significant and enabled the court to come to a determination on this issue, were the events that followed upon those which the defendants maintained occurred on 4, 5 and 8 November 1996. The net effect of a failure by the bank to accept and process the documentary credit application by Fleur Chem would be to cause considerable loss and damage to the defendants in light of the terms of the facility agreement which envisages that the bank would continue to provide credit within the limits of the agreement. Any such act on the part of the bank, particularly where it affected the defendants' business to the degree stated, would or should have resulted in the defendants taking umbrage and expressing in clear and unequivocal terms their outrage and indignation at the bank's failure to process a valid credit application. However despite the defendants contending that the bank's rejection had caused a near collapse of their cigarette manufacturing business, neither Fleur Chem nor Rubytrend took any steps to immediately stipulate, albeit orally or in writing, that the bank had acted wrongfully in rejecting their applications for credit and requiring it to rectify such wrongful rejection with immediate effect. Neither

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A did they indicate to the bank in any manner whatsoever that they considered such rejection to amount to a breach of the facilities agreements. DW1 and DW2 testified in the course of their evidence that they did not make any inquiry or complaint to the plaintiff with regards to the rejection of the documentary credit applications. This was confirmed by PW1.

B
[55] A further event that is relevant is the fact that the plaintiff did, after 5 November 1996, approve the defendant's application for a trust receipt, namely on 6 November 1996. It is telling however that despite such approval, the defendants did not see fit to query the bank about the wrongful rejection of their credit application on 5 November 1996. There was simply complete silence and inaction on their part. (The defendants respond to this by contending that this trust receipt was a conversion and not an application for a trust receipt. However DW1 admitted in the course of re-examination that unlike the other trust receipts there is no letter of credit preceding it. As such it amounts to a fresh application for a trust receipt).

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[56] In fact no mention was made by the defendants of these rejections of the applications for letters of credit, notwithstanding that they maintained it was crippling their business, until after the bank wrote to Fleur Chem and Rubytrend on 27 December 1996, some 49 days or more after the rejection. The issue was only raised by the defendants for the first time on 31 January 1997. It is this deafening silence between the dates of the alleged breach and the response after the bank's letter of 27 December 1996 that leads this court to conclude that the allegations of a breach by Fleur Chem and Rubytrend as a consequence of the wrongful rejection of the letter of credit facilities, lack basis and were in fact relied upon as an afterthought as a consequence of the bank's requirement that these entities regularise their accounts. Even then, in the letter of 31 January 1997 there was no specific mention of the applications for letters of credit on 5 and 8 November 1996. This court is therefore unable, on a balance of probabilities, to accept that the documentary credit applications were in fact submitted and wrongfully rejected by the bank.

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[57] In any event even if the bank did reject the credit applications submitted by the defendants, this did not amount to a cancellation of the banking facilities in toto of the defendants. It is evident from the chronology of events that the plaintiff only sought to recall the banking facilities well after these incident, after giving the defendants ample notice to regularise the excess in the overdraft facility and settle the outstanding trust receipts. The rejection of the credit facilities cannot therefore be equated with a wrongful withdrawal of banking facilities in toto, without notice to the defendants.

[58] Further, the rejection of the documentary credit applications even if

true, would not afford a complete defence to the bank's claims against Fleur Chem and Rubytrend and thereby the guarantors. It would at best, have entitled the entities to a counterclaim in damages.

A

Issue (v) Is the bank liable to the defendants by way of counterclaim for the losses suffered by Fleur Chem and Rubytrend as a consequence of the rejection of the letters of credit?

B

[59] As stated above the counterclaims by the defendants in the Fleur Chem suit and the Rubytrend suit are premised upon the wrongful 'rejection' of the documentary credit applications stated to have been made on 5 and 8 November 1996. At trial on 27 May 2009 the following counterclaims were struck off:

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(a) In the Fleur Chem suit the counterclaim by Fleur Chem, Mustaffa bin Zakaria and Chan Mew Yew were struck off, leaving only a subsisting counterclaim by Shia Lim.

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(b) In the Rubytrend suit, the counterclaim by Chan Mew Yew was struck off, leaving a subsisting counterclaim by Rubytrend and Chin.

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[60] The court has concluded above that the defendants contention that the bank acted in breach of its obligations under the facilities agreements is unfounded and without basis. In short the court concluded that the bank did not act in breach of its obligations to Fleur Chem and Rubytrend because it was not satisfied that there was a wrongful rejection of the credit applications. In view of this conclusion the entire substratum for the counterclaim also disintegrates. As there was no wrongful rejection of the facilities, the losses suffered by these entities is not attributable to any fault or liability of the bank.

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[61] Further, any such breach on the part of the bank, even if true, does not afford a defence to the guarantors to the banking facilities (see *American Express Sdn Bhd v Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91; *Imperial Steel Drum Manufacturers Sdn Bhd v Wong Kin Heng* [1997] 2 SLR 695 (HC); *Westco Motors (Distributors) Pty Ltd v Palmer* [1979] 2 NSWLR 93).

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[62] Further cl 10 of the guarantee and indemnity clearly provides that the guarantors shall not have the benefit of a set-off and counterclaim until all moneys and liabilities of Fleur Chem and Rubytrend have been paid:

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Unless all moneys and liabilities due or incurred by the Borrower to the Bank shall have been paid or discharged in full I/we will not... be entitled to claim or have the benefit of any set-off or counterclaim by the Borrower...

A [63] As such the subsisting counterclaims by Shia Lim in the Fleur Chem suit and by Rubytrend and Chin in the Rubytrend suit are therefore dismissed.

B CONCLUSION

[64] In conclusion the court concludes that:

- C (a) The bank has produced sufficient evidence to prove the sum claimed by it. The quantum claimed is not seriously disputed by the defendants.
- (b) The defendants maintain however that they are not liable to pay the sum claimed by the bank by reason of the bank's breach in wrongfully rejecting documentary credit applications submitted by the defendants on 5 and 8 November 1996.
- D (c) On a consideration of the totality of the evidence, the court concluded, on a balance of probabilities, that there is no merit in the defendants' contention that the bank wrongfully rejected documentary credit applications submitted by them on 5 and 8 November 1996.
- E (d) In any event even if the bank had acted in breach of its obligations under the facility agreements, such breach does not afford a complete defence to the defendants such that they are absolved completely from having to repay the monies loaned from the bank.
- F (e) As there was no wrongful rejection of the documentary credit applications, there was no breach by the defendants. As such there is no basis for the counterclaim lodged by the defendants. Further, Shia Lim and Chin as the guarantors who remain in the counterclaim are precluded from making any counterclaim until the moneys due have been fully paid.
- G (f) The defendants' contention that the facilities afforded to them were for a fixed term of three years is misconceived, as there is neither express nor implied provision to that effect.
- H (g) As such the bank is entitled to require repayment on demand as expressly contracted in the facilities agreements. There is no conflict in the provisions of the facilities agreements warranting the application of the contra proferentum rule in favour of the defendants. As such the demand by the bank and the legal action instituted against the
- I defendants is not premature.

[65] For these reasons it is concluded that the bank is entitled to enter judgment against the first and fourth defendants in the Fleur Chem suit and

against the first and third defendants in the Rubytrend suit. The counterclaims against the plaintiff are dismissed with costs.

Plaintiff's claim allowed. Defendants' counterclaims dismissed with costs.

Reported by Kohila Nesan

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